Supreme Court, U.S.
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No. _____

**IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA**

October Term 1996

Norman E. Skeens,
Petitioner,

v.

State of Arizona,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals
of the State of Arizona
Division 1

# Petition for Writ of Certiorari

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25 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 5.212 of the 1993 City of Glendale Zoning Ordinance is unconstitutional because it has no reasonable relation to the public health, safety, and welfare.

2. Whether the 1980 City of Glendale Zoning Ordinance, which was in effect on the date Petitioner Norman E. Skeens purchased the subject property, was unconstitutionally overbroad and thus void.

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this Petition for Writ of Certiorari under Title 28, United States Code, Section 1257(3).

Petitioner Norman E. Skeens seeks review of the denial of his claim in the Superior Court of the State of Arizona in and for the County of Maricopa that Article 9, Section 23 of the 1980 Glendale Zoning Ordinance was unconstitutional due to overbreadth.

Petitioner also seeks review of a memorandum decision of the Court of Appeals of the State of Arizona, Division One which was filed on May 30, 1996.

A timely Petition for Review was submitted to the Supreme Court of the State of Arizona. On January 17, 1997, the order denying the Petition for Review was entered.

## STATEMENT OF FACTS

Petitioner Norman E. Skeens and his wife, Mary Lou, own the one acre property located at 8607 West Cavalier Drive in Glendale, Arizona, Transcript of Proceedings, August 24, 1995, (hereinafter referred to as T followed by the page number of the reference) 18. Mr. and Mrs. Skeens have lived on the property since 1986. Roosters have lived on the property since before 1991, T 18, 20.

There are two other one acre properties to the west and then agricultural fields, T 18. To the south is a canal and agricultural fields, T 22. The development consists of one street with twenty-six one acre ranchettes on the north and south sides of West Cavalier Drive, T 17-18. There are agricultural fields to the north of the development, T 22. It is a transitional zone between agricultural and urban residential zones. The property is zoned SR-30 under the Glendale Zoning Ordinance, T 40.

## CONSTITUTIONAL PROVISIONS AND CITY ORDINANCES INVOLVED

Amendment 14, Section 1, *Constitution of the United States*, states, in the pertinent part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 9, Section 23(a)(3) of the 1980 Glendale Zoning Ordinance, provides in the pertinent part, that:

> Poultry — One thousand (1,000) square feet per each one hundred (100) birds. No male fowl ... shall be kept within the corporate limits.

Section 5.212 of the 1993 City of Glendale Zoning Ordinance provides, in the pertinent part, that:

> Raising and grazing of livestock,

> excluding swine, is permitted for a maximum of one (1) animal per ten thousand (10,000) square feet of open space. The raising of poultry, with the exception of male fowl, is permitted provided they are contained within a fence or cage.

Section 6-5.1 of the Glendale City Code provides, in the pertinent part, that:

> (a) No person shall keep a dog within the city limits which is in the habit of barking or howling or disturbing the peace and quiet of any neighborhood within the city.
>
> (b) The maintaining or keeping of any animal regulated by the provisions of this chapter shall be allowed only as long as such animals do not cause, create, or contribute to or become a health nuisance due to noise, the presence of flies, mosquitos, insects, vermin, rodent harborage, odors, dust, ponded waters, accumulation of manure, garbage, refuse, or other obnoxious or putrescible material or any other like reason.

In addition, Section 25-64 of the Glendale City Code provides, in the pertinent part, that:

> It shall be unlawful for any person to make or continue, or cause or permit to be made

> or continued, any excessive, unnecessary or offensive noise which disturbs the peace or quiet of any neighborhood or which caused discomfort or annoyance to any reasonable person of normal sensitivity residing in the area.

## STATEMENT OF THE CASE

Petitioner Norman E. Skeens was charged in the City of Glendale, Arizona, City Court, having a male fowl, a Polish crested rooster, on the property on June 28, 1994 in violation of Section 5.212 of the 1993 City of Glendale Zoning Ordinance, a misdemeanor. He first raised the issue that City of Glendale Zoning Ordinance Section 5.212 was unconstitutional in his Motion to Dismiss which was filed in the City of Glendale City Court on November 30, 1994.

Since there was no intelligible record of the proceedings in the City of Glendale City Court, a trial *de novo* was held in the Superior Court of the State of Arizona in and for the County of Maricopa, the Honorable Thomas Dunevant III, presiding, on August 25, 1995. At the trial, counsel for Mr. Skeens raised

the issues of the constitutionality of both Article 9, Section 23 of the 1980 City of Glendale Zoning Code and Section 5.212 of the 1993 City of Glendale Zoning Ordinance.

Judge Dunevant found that Section 5.212 of the City of Glendale Zoning Ordinance did not violate due process and equal protection, August 28, 1995 Minute Entry. As a result, on August 28, 1995, Judge Dunevant found Mr. Skeens guilty of violation of Section 5.212 of the 1993 City of Glendale Zoning Ordinance.

A timely appeal was made to the Court of Appeals of the State of Arizona, Division One. The Court of Appeals held in a memorandum decision filed on May 30, 1996, that Section 5.212 of the 1993 City of Glendale Zoning Ordinance allowing the raising of poultry, with the exception of male fowl, was constitutional. The Court found that the ordinance was not arbitrary or unreasonable. The Court also found that the ordinance does not violate equal protection.

A timely Petition for Review was submitted to the Supreme Court of the State of Arizona. On January 17, 1997, the order denying the Petition for Review was entered.

**REASONS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.**

It is a most ancient saying that a man's home is his castle. This is a case where the City of Glendale, Arizona allows Petitioner Norman E. Skeens to keep on the one acre ranchette two neighing horses, two braying donkeys, two mooing cows, six barking dogs, two hundred honking geese, two hundred clucking chickens, and two hundred shrieking conure birds, but not one rooster, Section 5.212, 1993 City of Glendale Zoning Ordinance; Table 1, Page 5-17; T 48.

Mr. Skeens owns an one acre ranchette at 8607 West Cavalier Drive in Glendale, Arizona, T 18. The development consists of one street with twenty-six one acre ranchettes on the north and south sides of West Cavalier Drive, T 17-18. There

are two other one acre properties to the west of his ranchette and then agricultural fields, T 18. To the south is a canal and agricultural fields, T 22. There are agricultural fields to the north of the development, T 22.

**1. Section 5.212 of the 1993 City of Glendale Zoning Ordinance is unconstitutional because it has no reasonable relation to the public health, safety, and welfare.**

In its decision, the Court of Appeals of the State of Arizona separates the due process and equal protection arguments. The distinctions between the privilege and immunity clause, the equal protection clause, and the due process clause are often so fine as to be indistinguishable, *Sult v. O'Brien*, 15 Ariz.App. 384, 388, N. 5, 488 P.2d 1021 (1971). The due process clause of the Fourteenth Amendment to the Federal Constitution protects liberty and property interests against impermissible government restrictions, *Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1979). On

the other hand, the equal protection clause protects against discriminatory enforcement, *Nordlinger v. Hahn*, 505 U.S. 1 (1992). What is at issue in this case, is whether Mr. Skeens has the right to full enjoyment of the use of his one acre ranchette by having a male fowl on the property.

The error of the Court of Appeals in this case is that the Court of Appeals did not look beyond the issue of whether there was a rational basis to exclude male fowl from the SR-30 district. The fact that the city is dealing with a distinct class and treats the members equally does not end the judicial inquiry, *Carrington v. Rash*, 380 U.S. 89 (1965). What the Court of Appeals did not do in this case was determine whether the classifications drawn in Section 5.212 of the 1993 City of Glendale Zoning Ordinance in only excluding male poultry, but allowing horses, donkeys, cows, dogs, cats, ducks, geese, and conures, are reasonable in light of the City of Glendale's assumed noise abatement objective, *see McLaughlin v. State of*

*Florida*, 379 U.S. 184 (1964).

The government's zoning power is not infinite and unchallengeable, but must be exercised within constitutional limits, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). Discriminatory zoning is the antithesis is good land use control, *Penn Central Trans. Co. v. City of New York*, 433 U.S. 104 (1978).

The general principles underlying the application of the equal protection clause to zoning ordinances is that (1) all land in similar circumstances should be zoned alike and (2) that differential treatment must be justified by a showing of different circumstances justifying such treatment, *Jachimek v. Superior Court, Maricopa County*, 169 Ariz. 317, 819 P.2d 487 (1991). Under the rational basis test, the equal protection clause is violated if the classification rests on grounds wholly irrelevant to the achievement of the City's objective, *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984).

The issues are whether the ordinance has a legitimate purpose and whether the classification will promote that purpose, *Romer v. Evans*, _____ U.S. _____, 116 S.Ct. 1620 , 134 L.Ed.2d 855 (1996); *Big D Const. Corp. v. Court of Appeals, Div. One*, 163 Ariz. 560, 789 P.2d 1061 (1990). A zoning ordinance may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational, *Elysium Institute, Inc. v. County of Los Angeles*, 232 Cal.App.3d 408, 283 Cal.Rptr. 688 (1991). There must be reasonable grounds for the classification, *McLaughlin v. Florida, supra.* In addition, there must be a substantial difference between those within the class and those outside the class, *Farmer v. Killingsworth*, 102 Ariz. 44, 424 P.2d 172 (1967). In other words, the equal protection clause prevents the government from treating differently, persons who are in all relevant aspects alike, *Nordlinger v. Hahn, supra.*

When the government uses its zoning power to intrude

on choices concerning family lifestyle, this Court must carefully examine the importance of the government interests advanced and the extent to which they are served by the challenged regulations, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

In *City of Cleburn, Texas v. Cleburn Living Center*, 473 U.S. 432 (1985), the city zoning ordinance required a special use permit for a group home for the mentally retarded in a district which allowed other group homes and apartments. This Court found that there was no rational basis to believe that a group home for the mentally retarded posed any special threat to the city's legitimate interests that was not equally true of other group homes and apartments, *Id.*

Section 5.212 of the City of 1993 Glendale Zoning Ordinance provides, in the pertinent part, that:

> Raising and grazing of livestock, excluding swine, is permitted for a maximum of one (1) animal per ten thousand (10,000) square

> feet of open space. The raising of poultry, with the exception of male fowl, is permitted provided they are contained within a fence or cage.

Section 5.212 of the 1993 City of Glendale Zoning Ordinance permits the raising and grazing of livestock, excluding swine. The raising of poultry is permitted, but male poultry are not permitted. The 1993 City of Glendale Zoning Ordinance give no reason for the exclusion of male poultry. At the Superior Court trial, the City of Glendale zoning code enforcement officer said his personal assumption that the purpose of the exclusion of male poultry was noise abatement, T 45.

Raising chickens is not a nuisance *per se*, *McCollum v. Kolokotrones*, 131 Minn. 438, 311 N.W.2d 780 (1957). Likewise, prohibiting the raising of pigeons, chickens, and other poultry is clearly arbitrary and unreasonable, without substantial relation to the public health, safety, or general

welfare, *State v. Nelson*, 499 N.W.2d 512 (Minn., 1993); *Hahn v. City of Brooklyn*, 78 OhioL.Abs. 429, 153 N.E.2d 359 (1958); *Kraushaar v. Zion*, 188 Misc. 851, 63 N.Y.S.2d 359 (1946).

The crowing of a rooster in the early morning hours is not a nuisance *per se*, *Myer v. Minard*, 21 So.2d 72 (La.App., 1945). The Court wrote:

> We cannot conceive of a normal person, endowed with ordinary sensibilities and ordinary habits, being greatly discomforted by the announcement of a new day from the well trained voice of a stately cock ... . *Id.* at 76

In addition to Section 5.212 of the 1993 Zoning Ordinance, the City of Glendale has enacted several ordinances to control noise. Section 6-5.1 of the Glendale City Code provides, in the pertinent part, that:

> (a) No person shall keep a dog within the city limits which is in the habit of barking or howling or disturbing the peace and quiet of any neighborhood within the city.

> (b) The maintaining or keeping of any animal regulated by the provisions of this chapter shall be allowed only as long as such animals do not cause, create, or contribute to or become a health nuisance due to noise, the presence of flies, mosquitos, insects, vermin, rodent harborage, odors, dust, ponded waters, accumulation of manure, garbage, refuse, or other obnoxious or putrescible material or any other like reason.

In addition, Section 25-64 of the Glendale City Code provides, in the pertinent part, that:

> It shall be unlawful for any person to make or continue, or cause or permit to be made or continued, any excessive, unnecessary or offensive noise which disturbs the peace or quiet of any neighborhood or which caused discomfort or annoyance to any reasonable person of normal sensitivity residing in the area.

Under the Glendale Zoning Ordinance, the lots in the SR-30 zone are to be a minimum of 30,000 square feet. 22,500 square feet is reserved for open space. Thus, two horses, two donkeys, two cows, or two of other types of livestock are permitted on the property, Ordinance, Table 1, page 5-17.

Dogs, cats, ducks, geese, and conures are permitted on the property, T 48.

Evidence is in the record that donkeys bray in the early morning and are louder than roosters, testimony of Bradford Schofield before the Glendale City Court (hereinafter referred to as S followed by the page number of the reference), 11, 16. Conures, exotic birds allowed by the ordinance, shrieked in the early morning and are louder than roosters, S 9-10, 14-16. It is clear that a single Polish Crested rooster would have less adverse impact on the public health, safety, morals, or general welfare than two horses, two donkeys, or two cows.

In this case, the Court of Appeals decided this important issue of law incorrectly. At trial, the City never presented testimony regarding its reason for the exclusion of male poultry from SR-30 districts. The exclusion of male poultry from SR-30 districts as a noise abatement measure when horses, donkeys, cows, dogs, cats, ducks, geese, and conures are

permitted is arbitrary, irrational, and unreasonable, *McLaughlin v. Florida, supra.* On the noise abatement issue, there is no substantial difference between male poultry and horses, donkeys, cows, dogs, cats, ducks, geese, and conures, *Farmer v. Killingsworth, supra.* In other words, the City of Glendale has not shown that the sounds produced by male poultry differs from the sounds produced by horses, donkeys, cows, dogs, cats, ducks, geese, and conures to such a degree as to justify the exclusion of male poultry from the R-30 district, *Jachimek v. Superior Court, Maricopa County, supra.* Section 5.212 of the City of Glendale Zoning Ordinance violates the due process and equal protection provisions of the Fourteenth Amendment to the Federal Constitution.

**2. The 1980 City of Glendale Zoning Ordinance, which was in effect on the date Mr. Skeens purchased the subject property, was unconstitutionally overbroad and thus void.**

When Mr. and Mrs. Skeens purchased the property in 1986, the 1980 City of Glendale Zoning Code was in effect. Article 9, Section 23(3) of the Code, stated:

> Poultry — One thousand (1,000) square feet per each one hundred (100) birds. No male fowl and no swine shall be kept within the corporate limits.

A statute is overbroad when its language, given its ordinary meaning, is so broad that its sanctions apply to constitutionally protected conduct, *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Under Article 9, Section 23(3) of the 1980 City of Glendale Zoning Code male fowl were not permitted on 600 acre farms, pet stores, or livestock supply stores, T 84-87. Gifts of chicks and ducklings at Easter were prohibited under the ordinance, T 87. The manager of the City's planning division was of the opinion that enforcement of this provision of the Zoning Ordinance would be left to the whim of the enforcement officers acting on an *ad hoc* and

subjective basis, T 87; *Grayned v. City of Rockford, supra.*; *Papacristou v. City of Jacksonville*, 405 U.S. 156 (1972).

Article 9, Section 23(3) of the 1980 City of Glendale Zoning Code is clearly unconstitutional due to overbreadth, *Id.* Mr. Skeens keeping the rooster on the property prior to the enactment of the 1993 Ordinance was legal. At the time of the enactment of the 1993 Ordinance, Mr. Skeens had a valid non-conforming use and he could not charged under the 1993 Ordinance, *A.R.S.* § 9-462.02; *Rotter v. Coconino County*, 169 Ariz. 269, 818 P.2d 704 (1991).

**CONCLUSION**

WHEREFORE, Petitioner Norman E. Skeens respectfully requests that the Supreme Court of the United States of America:

1. issue a Writ of Certiorari to the Court of Appeals of the State of Arizona, Division One, for all pleadings concerning its Case No. 1 CA-CV 95-0767,

2. set aside the memorandum decision the Court of Appeals of the State of Arizona issued in Case No. 1 CA-CV 95-0767,

3. find that Section 5.212 of the 1993 City of Glendale Zoning Ordinance is unconstitutional in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution,

4. find that Article 9, Section 23(a)(3) of the 1980 City of Glendale Zoning Ordinance is unconstitutional due to overbreadth in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, and

5. issue a mandate to the Superior Court of the State of Arizona in and for the County of Maricopa that the judgment of conviction and sentence be set aside and the complaint be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 11th day of April, 1997.

***SKEENS & ANDERSON***

*By* _____

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*Glendale, Arizona 85301-7208*
*Telephone: 602-846-8416*
*Attorneys for the Petitioner*

# APPENDIX

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No. _____

**IN THE SUPREME COURT**
**OF THE**
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October Term 1996

Norman E. Skeens,
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State of Arizona,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals
of the State of Arizona
Division 1

**Appendix to**
**Petition for Writ of Certiorari**

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**SUPREME COURT**
**STATE OF ARIZONA**

State of Arizona vs. Norman E. Skeens

Supreme Court No. CR-96-0411-PR
Court of Appeals No. 1 CA-CR 95-0767
Maricopa County No. LC 95-00170

The following action was taken by the Supreme Court of the State of Arizona on January 14, 1997, in regard to the above-referenced cause:

ORDERED: Petition for Review = Denied.

Record returned to Court of Appeals, Division One, Phoenix, this 17th day of January, 1997.

NOEL K. DESSAINT, Clerk

* * *

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | 1 CA-CR 95-0767 |
| Appellee, | ) | |
| | ) | DEPARTMENT D |
| v. | ) | |
| | ) | MEMORANDUM |
| NORMAN E. SKEENS, | ) | DECISION |
| | ) | |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court of Maricopa County

Cause No. LC 95-00170

The Honorable Thomas Dunevant, III, Judge

AFFIRMED

* * *

GABARINO, Judge

Norman E. Skeens (defendant) was convicted in Glendale City Court of keeping a rooster on his property, a misdemeanor in violation of Glendale Zoning Ordinance

Section 5.212. Defendant appealed his conviction to the Maricopa County Superior Court and was again found guilty after a trial de novo. He now appeals the superior court's determination of guilt and challenges the constitutionality of the Glendale zoning ordinance under which he was convicted, Section 5.212. We have jurisdiction pursuant to Arizona Revised Statutes Annotated (A.R.S.) section 22-375 to consider defendant's constitutional challenge, and find the ordinance constitutional.[1]

## FACTUAL AND PROCEDURAL HISTORY

Section 5.212 reads:

> Raising and grazing livestock, excluding swine, is permitted for a maximum of one (1)

---

[1]Defendant also challenges the constitutionality of the Glendale ordinance that pre-dated Section 5.212. He argues that, because of the prior ordinance was unconstitutional and because the rooster was on his property before the prior ordinance was replaced by Section 5.212, the rooster's presence was a nonconforming use exempting him from liability under the current ordinance. Our review on appeal, however, is limited solely to the facial validity of Section 5.212. See A.R.S. Section 22-375; *State v. Martin*, 174 Ariz. 118, 121, 847, P.2d 619, 622 (App. 1992). Because defendant's argument regarding the pre-1993 ordinance concerns whether Section 5.212 could be applied to him even if it were facially valid, we do not have jurisdiction to consider that argument. *See Martin*, 174 Ariz. at 121, 847 P.2d at 622 ("Our jurisdiction does not extend to examining the application of the statute to an individual defendant.").

> animal per ten thousand (10,000) square feet of open space. The raising of poultry, with the exception of male fowl, is permitted provided they are contained within a fence or cage.

The ordinance applies to all property located within SR-30 zoned areas in Glendale, including defendant's residence. Despite the ordinance's prohibition against male fowl, defendant kept roosters on his property. During 1993 and 1994, the City of Glendale (the City) received complaints about pre-dawn crowing coming from defendant's yard. On two occasions, the City issued defendant a Notice and Order to Comply with the zoning ordinance prohibiting male fowl. An inspection of defendant's property on June 28, 1994, however, revealed that one rooster remained on the property.

The City subsequently filed a misdemeanor complaint against defendant for violating Section 5.212. He was convicted in Glendale City Court and appealed to the Maricopa County Superior Court. He received a trial de novo in superior court and was again convicted. He now appeals to this Court

pursuant to A.R.S. section 22-375.

## DISCUSSION

### I. Section 5.212 Is Not Arbitrary or Unreasonable

Defendant argues on appeal that Section 5.212 is unconstitutional because it does not bear a substantial relation to the public health, safety, morals or general welfare. *See Corrigan v. City of Scottsdale*, 149 Ariz. 553, 558, 720 P.2d 528, 533 (App. 1985); *aff'd in part, rev'd in part*, 149 Ariz. 538, 730, P.2d 513, *cert. denied*, 479 U.S. 986 (1986) ("The principal test to be applied by a trial court on the issue of a zoning ordinance's constitutionality is whether the zoning bears a substantial relation to the public health, safety, morals or general welfare."). Specifically, he argues that, because the admitted purpose of Section 5.212 is noise abatement, the City acted arbitrarily in excluding only male fowl. According to defendant, animals not prohibited by Section 5.212 make as much, if not more, noise than roosters, yet the City chose not to

prohibit ownership of those animals. Thus, argues defendant, because the City has acted in a "discriminatory manner" in excluding only male fowl, Section 5.212 is unconstitutional.

At the trial de novo, the manager of the City's planning division explained the City's decision to prohibit male fowl from SR-30 zoned areas:

> [T]he primary reason is that roosters have an annoying habit of crowing at odd hours of the day, and again, when dealing with noise, it is not just the volume of the noise . . . it has to do with the ambient noise levels at that time of day, and also has to do with the frequency or pitch of the noise. There [are] a number of factors which generally people find annoying in an urban environment.
>
> . . . .
>
> [U]nlike some of the other animals which were discussed, it was felt that this -- this particular noise from the male fowl, and specifically male roosters, was annoying to the point where the community did not want to live with that. That was unlike the noise from barking dogs, cats, other animals which the community, like many communities, has come to accept without question.

We may find Section 5.212 unconstitutional only if it is clearly arbitrary and unreasonable and is without any substantial relation to the public health, safety, morals or general welfare. *Pima County v. Arizona Title Ins. & Trust Co.*, 115 Ariz, 344, 346, 565 P.2d 524, 526 (App., 1977). As we noted in *Corrigan v. City of Scottsdale*, "[t]his court does not sit as a super-zoning commission, and will not pass on the wisdom of the ordinance." 149 Ariz. At 560, 720 P.2d at 535. Rather, if the reasonableness of the ordinance is "fairly debatable, " we must uphold it. *Id.* At 558, 560, 720 P.2d 533, 535.

In this case, we find the reasonableness of Section 5.212's prohibition against male fowl to be at least "fairly debatable." The City has designated SR-30 zoned areas as low density, residential districts. See Glendale Zoning Ordinance Section 5.201. Given the residential nature of these areas, we do not believe that the City acted arbitrarily in prohibiting male

fowl based on the conclusion that the nature and frequency of noise made by such animals "was annoying to the point where the community simply did not want to live with that." *See, e.g.*, 6 Patrick J. Rohan, *Zoning and Land Use Controls* § 36.02[3], at 36-38 (1992) (zoning ordinance promotes general welfare if it furthers preservation of the character of the community). As is evidenced by the complaints received by at least one of defendant's neighbors, the City was not unreasonable in concluding that the type and the timing of noise made by male fowl, and especially roosters, was inconsistent with the residential nature of SR-30 zoned areas. We therefore do not find that Section 5.212 is "clearly arbitrary and unreasonable." *See Arizona Title Ins. & Trust Co.*, 115 Ariz. at 346, 565 P.2d at 526.

**II. Section 5.212 Does Not Violate Equal Protection**

Defendant argues that the "clearly arbitrary and unreasonable" standard is inappropriate in this case because

Section 5.212 violates equal protection. According to defendant, because the ordinance affects his "fundamental right" to own property, we may uphold the ordinance only if, applying a strict scrutiny test, we find that the prohibition against male fowl serves a compelling state interest and the regulation is necessary to achieve that interest. *See Bryant v. Continental Conveyor Equip. Co.*, 156 Ariz. 193, 196, 751 P.2d 509, 512 (1988), *rev'd on other grounds, Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 861 P.2d 625 (1993). We disagree.

Property rights are not "fundamental rights" as that term is used in equal protection analysis. *See County Bd. of Arlington v. Richards*, 434 U.S. 5, 7 (1977) (applying rational basis test); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (same); *see also Cormier v. City of San Luis Obispo*, 161 Cal.App.3d 850, 856, 207 Cal. Rptr. 880, 884 (1984) (right to own and use property not a "fundamental right" requiring

strict scrutiny analysis for equal protection challenge); *McSwain v. Commonwealth*, 520 A.2d 527, 530 (Pa. 1987) ("[R]ights which have been deemed to be fundamental [for equal protection purposes], thus, triggering strict scrutiny, include privacy and freedom of speech, but do not include the right to freely hold and dispose of one's property.").

Because Section 5.212 neither discriminates against a protected class nor implicates a fundamental right, the rational basis test is the appropriate standard for determining whether it violates the Equal Protection Clause. *See, e.g., Caldwell v. Pima County*, 172 Ariz. 352, 355, 837 P.2d 154, 157 (App. 1991) (ordinance prohibiting open-air businesses subject to rational basis test). "Under the rational basis test, the equal protection clause 'is only violated if the classification rests on grounds wholly irrelevant to the achievement of the state's objectives.' Unless the statute is arbitrary or irrational, it will be upheld." Id. (citation omitted). As we have already

concluded, in prohibiting male fowl from SR-30 zoned areas, Section 5.212 is neither arbitrary nor irrational. We therefore reject defendant's argument that the ordinance violates equal protection.

**CONCLUSION**

We find that Glendale Zoning Ordinance Section 5.212 is constitutional and affirm defendant's misdemeanor conviction and the fine imposed.

/s/ William F. Gabardino
Judge

CONCURRING:

/s/ Cecil B. Patterson, Jr.
Presiding Judge

/s/ Thomas C. Kleinschmidt
Judge

**SUPERIOR COURT OF ARIZONA**
**MARICOPA COUNTY**

Hon. Thomas Dunevant III
[Superior Court Judge]

August 28, 1995

No. LC 95-00170

State of Arizona

v.

Norman Skeens

This matter having come before the court for trial (de novo) without a jury and the court having considered the evidence, argument, and relevant law finds:

**FACTUAL BACKGROUND AND INTRODUCTION:**

The complaint dated July 20, 1994, "complains" that the City of Glendale, Maricopa County, defendant, Norman Skeens, on or about June 28, 1994, committed a misdemeanor, to wit:

"Zoning violation, male fowl, by keeping a male

fowl at 8607 W. Cavalier Drive, in violation of zoning ordinance[s] of the City of Glendale, Section 5.212 and Sec. 1.302(B)."

Section 5.212 provides in pertinent part:

"Raising and grazing of livestock, excluding swine, is permitted for a maximum of one (1) animal per ten thousand (10,000) square feet of open space. The raising of poultry, with the exception of male fowl, is permitted provided they are contained within a fence or cage."

The defendant Norman Skeens owns property located at 8607 West Cavalier Drive in Glendale and his property is zoned SR-30 under the Glendale Zoning Ordinance. On July 20, 1994, defendant had and permitted a male fowl (rooster) to be on his property in violation of Section 5.212.

**DISCUSSION:**

The defendant argues that Glendale Ordinance Section 5.213 is unconstitutional in violation of due process and equal protection because that section is arbitrary and unreasonable, without any substantial relation to the public health, safety, morals or general welfare, and discriminates against persons

who have male fowl on their property.

The "constitutionality" of Section 5.212 must be tested against whether there is any reasonable relationship between the ordinance and a legitimate governmental purpose. Noise abatement is a legitimate governmental purpose in zoning ordinances, and the zoning commission in its legislative-policy making function is the entity that determines whether other noise producing animals should be prohibited.

The general legislative intent of Section 1.202 is as follows:

> "The purpose of this ordinance is to establish land use classifications dividing the city into various zoning districts; [to] provide regulations, prohibitions and restrictions for the promotion of health, safety, convenience, aesthetics, and welfare. . . ."

The purpose of SR-30 zoning is specified in Section 5.201:

> The single residence seek to encourage and preserve low density residential uses. The

> intent of these districts is to reduce land use conflicts between urban and agricultural by providing a transition in intensity between rural and urban residential uses. Nonresidential land uses withinthe districts are limited in nature to maintain a residential character.

The principal purpose of SR-30 is to maintain a residential character. The prohibition against male fowls is not arbitrary or unreasonable, or without substantial relation to public health, safety, morals or general welfare. The ordinance does not unconstitutionally discriminate against persons who have male fowl on their property. Zoning ordinances are presumed valid, and such presumptions can only be overcome by demonstrating that the ordinance contains a classification that is clearly arbitrary, unreasonable, and without any substantial relation to public health, safety, morals or general welfare. *Dye v. City of Phoenix*, 25 Ariz. App. 193; *City of Phoenix v. Oglesby*, 112 Ariz. 64. Furthermore, if the record shows a reasonable basis for the action of the zoning authorities, and if the reasonableness of the ordinance is fairly

debatable, the legislative determination will not be disturbed. *Dye v. City of Phoenix*. Here, the loud crowing noise that a rooster makes at dawn or daybreak is the type of noise which a governmental entity can conclude will diminish the general health, welfare and convenience of area residents by awakening them at such an early hour.

**CONCLUSION**

IT IS ORDERED AND ADJUDGED:

Defendant Norman Skeens is guilty of violating Section 5.212 and Section 1.302 of the City of Glendale Zoning Ordinance.

Section 5.212 and Section 1.302(b) are not unconstitutional.

**SUPERIOR COURT OF ARIZONA**
**MARICOPA COUNTY**

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | No. LCA 95-00170 |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NORMAN E. SKEENS, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

Phoenix, Arizona
August 25, 1995
9:05 a.m.

BEFORE THE HONORABLE THOMAS DUNEVANT, III

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXCERPTS FROM THE TESTIMONY OF

ROBERT G. STRATTON
(Neighbor)

DIRECT EXAMINATION BY MS. MADISON
[ Page 17, Line 18]

Q. And where do you live?

A. 8627 West Cavalier in Glendale.

Q. And Mr. Stratton, how long have you lived at 8627 West Cavalier?

A. A little over five years.

Q. And Mr. Stratton, can you characterize what the neighborhood is like at 8627 West Cavalier?

A. Yeah, it is a series of acre ranchettes, [Page 18] one-half mile streets heading west off of 83rd Avenue, approximately, approximately 26 homes, probably, somewhere in that range.

Q. And do you have a neighbor by the name of Norman Skeens?

A. Yes, ma'am.

Q. And where does he live in relation to you?

A. He lives two doors to the east.

Q. And approximately how far from your home is that then?

A. I don't know, 250 feet, probably.

Q. When you moved into your home, was Mr. Skeens, or the defendant, already at that residence, or did he move there after you were there?

A. No, he was there.

* * *

[Page 18, Line 25]

Q. BY MS. MADISON: Mr. Stratton, can you [Page 19] please tell the Court what you have encountered over the last couple of years?

A. Several -- well, pretty much ever since I've been living there, main crux of the problem is that there are roosters that would crow very early in the morning, and I have a job where

I get up around 5:00, but these things would start 3:00, 4:00 and would wake me up. So, a couple years ago when all of this started, I left a note on Mr. Skeens' vehicle that, that this was bothering me and wondered if he couldn't do something about it.

It went on and on, and I, and I called him about it one morning and, and he said he enjoyed the sound of the roosters crowing and was pretty much his right to have that.

So at that point I, I contacted the City of Glendale, and there was an ordinance against the roosters, and the City was pretty, has pretty much taken it from there.

Q. Have you ever seen the roosters on this property?

A. Yes, ma'am.

Q. Can you describe what the rooster looks like?

A. It is dark, has a red crow on its head, pretty much just a dark looking big chicken to me. [Page 20]

Q. And Mr. Stratton, do you recall what year this, this

problem began?

A. Well, I have heard it for years, you know, probably '91, '92, I think. I think this all -- when I first initiated it and told Mr. Skeens that it was bothering us, I would say that was probably in '93.

* * *

CROSS-EXAMINATION BY MR. ANDERSON:

Q. The area you moved into was one where you thought that you would enjoy a farm-style living, is that correct?

A. Suburb area, yes.

Q. You knew that there was cows, is that correct, in the neighborhood?

A. Yes, sir.

Q. Horses?

A. Uh-huh. [Page 21]

Q. Is that yes or no?

A. Yes, sir.

Q. Donkeys?

A. Yes.

Q. Ducks?

A. Yes.

Q. Other people have chickens, don't they?

A. Yes.

Q. Other people have roosters, don't they?

A. Not that I am aware of.

Q. Have you not heard roosters in the neighborhood in the last five or six months?

A. No.

Q. Okay. You know that they have geese and exotic birds in the neighborhood?

A. Not to my knowledge -- geese?

Q. Well, as far as you know, the other neighbors do, but you don't hear them, is that correct?

A. Well, I don't even think that there is geese there. They

are, they were just recently killed off, if you want to get technical about it.

Q. But the geese are now gone?

A. Yes.

Q. But at times there have been geese there, is that correct?

[Page 22]

A. Yes, sir.

Q. And surrounding this area is all agriculture, isn't it?

A. Correct.

Q. On the south side is huge fields, is that correct?

A. Cotton fields, yes.

Q. There are fields, aren't there?

A. Fields.

Q. And to the east, or to the west is huge fields?

A. Yes.

Q. And to the north there are huge fields?

A. Yes.

Q. And on to the west, I mean the east side, there is a major thoroughfare?

A. Yes.

Q. Right behind your place is a large canal?

A. Yes.

* * *

[Page 23] Q. And the fields are constantly under water from the irrigation, aren't they?

A. At times, yes.

Q. And there is birds and other animals or other fowl or other, other flying animals all over the place?

A. I haven't kept track of it, but yes, there are birds.

EXCERPTS FROM THE TESTIMONY OF

GEORGE EBNER
(Zoning Code Enforcement Officer)

DIRECT EXAMINATION BY MS. MADISON
[ Page 40, Line 10]

Q. Is the area that the defendant lives an SR-30 area?

A. Yes, it is.

Q. When did this new zoning ordinance come into effect?

A. July 23rd, 1993.

Q. And prior to July 23rd, 1993, was there a zoning ordinance in effect?

A. Yes, there was.

Q. Did that zoning ordinance address the keeping of male fowl?

A. Yes, it did. Under the old zoning ordinance, Article 9, Section 23, Paragraph A, Item 3 forbade the keeping of any -- I'm sorry, any male fowl within the city corporate limits.

* * *

Q. You never saw this rooster crowing, did you?

A. No, I did not.

Q. He was mating, he was not crowing? [Page 45]

A. That's correct.

Q. The purpose of this statute, the code is to -- for noise abatement, isn't it?

A. I can only assume that, that the crowing was a problem, and the ordinance was in response to that. that was my personal assumption on that.

* * *

Q. Poultry is allowed under the statute, is that correct?

A. Yes, it is, sir.

Q. Okay. So it cannot be for, for dust because poultry, other than males, make dust, is that correct?

A. Oh, they can, yes, sir.

Q. And it can't be for bugs because male and female

poultries chase bugs or have bugs, is that correct?

A. That's reasonable.

Q. So it can't be for that purpose, can it?

A. It wouldn't be for that purpose, no.

Q. And it isn't for manure because there is cows and horses and pigs -- well, not pigs, but I should say ducks and everything else, correct?

A. That's correct.

* * *

[Page 48] Q. Ducks are permitted?

A. Yes, they are.

Q. Geese?

A. Yes, they are.

Q. Peacocks?

A. They are permitted.

Q. Exotic birds?

A. Yes, they are, sir.

Q. Donkeys?

A. Yes.

Q. And dogs?

A. Yes.

Q. And cats, I forgot to mention cats. ... Is that correct?

A. That's correct, sir.

Q. And cats can make a lot of noise, can't they?

A. Oh, yes, sir, they can.

Q. And that noise generally is made at night, isn't it?

A. Yes.

Q. Enough to disturb people?

A. Yes, sir.

## ORAL MOTION FOR JUDGMENT OF ACQUITTAL BY DEFENSE COUNSEL

[Page 91, Lines 13] MR. ANDERSON: At this time we would like to have a motion for judgment of acquittal under Rule 20, and may I address the Court with respect to that?

THE COURT: Yes, you may.

MR. ANDERSON: Okay. The evidence in this case is -- the evidence in this case is that on July 23rd, 1993, a new zoning regulation was implemented, and that is the source of the complaint against Norman Skeens. Prior to that, the only prohibition for having roosters was this statute, Section 23, which said that no male fowl or swine shall be kept within the corporate limits.

We have established that the corporate limits is 55 miles square. All these things that we [Page 92] talked about, the 600-acre farms and the Hickman Farms where they raise chickens and stuff like that, and we are, we are going to tell this

Court that that old statute on its face was unconstitutional. It was over broad.

We have now shown you that under that old statute, giving little chicklets or ducklings to kids on, on Easter is a crime, and if a person does that, every time he does it, it is a new crime, and goodness knows, if you gave ten of these things, you would be guilty of ten misdemeanors, and the poor little child would, would be guilty, and their parents would be guilty of aiding and abetting, and of course that statute was over broadbecause it did not have sections where there was compatibility. It didn't have -- it didn't have the purposes of zoning classifications, all the things he talked about.

So, the statute prior to 7 of '93 was unconstitutional. You have absolutely no evidence before you as to when Norman Skeens moved in that property. You have -- and it is the Government's responsibility at this juncture to show you that he does not have a nonconforming use. You don't know

and the government has furnished you absolutely no evidence when he moved in.

For all we know and you know, because the [Page 93] Government has provided you with no information about it, he may have had, may have been in the country, and if he was not in the county, and you don't want to believe that, then the statute was unconstitutional, and therefore, when the new statute went into effect, he had a nonconforming use. He had a use of that property that was, that was consistent with, you know, ranchettes, and then the new statute comes along and says you can't have something, when he has had it there for who knows how long.

So, we think that at this juncture, at this juncture in the Government's case, you should grant a motion for directed verdict, judgment of acquittal, I should say, under Rule 20 because they have failed to show the very basic elements of this crime.

Therefore, we move that you grant a judgment of acquittal.

**IN THE CITY OF GLENDALE CITY COURT**
**COUNTY OF MARICOPA, STATE OF ARIZONA**

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | No. 94-P-1298 |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NORMAN E. SKEENS, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

Glendale, Arizona

February 9, 1995

EXCERPTED TESTIMONY OF BRADFORD R. SCHOLFIELD

EXCERPTS FROM TESTIMONY OF

BRADFORD R. SCHOLFIELD
(Professional Mechanical Engineer)

DIRECT EXAMINATION BY MR. ANDERSON [Page 4]

Q. Are you employed – have you testified in other matters as an expert in engineering matters?

A. Yes, I have.

Q. Could you please tell us if you've been assigned a -- or have you been given a task to gain the, to figure out the decibels or the loudness of noise of various animals?

A. Yes, I have.

Q. Okay. And then could you please tell us who engaged you to do that?

A. Mr. Norm Skeens engaged me.

Q. And how was your engagement, how were -- what were you to do? [Page 5]

A. I was to record the sound levels of his rooster, a donkey and a bird called a conyer I believe.

Q. Could you please tell us what you have -- is there such an instrument that can do that?

A. Yes. It's called a sound analyzer.

Q. Is it readily available to the public?

A. Yes. It's a -- well, it's common in engineering.

Q. Okay. and is it something that most people own or do you have to rent?

A. Oh, most people wouldn't own it, you'd have to lease it or rent it like I do.

Q. Okay. And did you, in fact, go lease one?

A. Yes, I did.

Q. Did you find that machine to be in good working order?

A. Yes, it was.

Q. Did it have a manual so that you could test it and see that it was in good working order?

A. Yes.

Q. Did you find that it was in good working order?

A. Yes, it was.

Q. What did you do with that machine that [Page 6] you rented?

A. I brought it over to Mr. Norm Skeens on the morning of February 4th, approximately 5:30 in the morning and set it up on AC power.

Q. Did you -- were you able to record?

A. Yes. I think approximately about 6:00 a.m. the rooster started to crow.

Q. Incidentally, where was the rooster when you --

A. It was in a tree in its backyard.

Q. Okay. It was not in a cage?

A. No.

Q. Could you please tell us what your readings were?

A. Well, the sound analyzer what it does is it records frequencies in the audible range of the human ear. Approximately 20 to 20,000 currents, hertz being one cycle per

second. And for every frequency it gives a decibel level or volume level.

In the case of the rooster there were primarily two frequencies that stood out in the lower AD decibel range. Now I should probably tell you, so this will make more sense, that the decibel scale runs from zero to 120. Loud is considered 70. Very loud is [Page 7] considered 90, deafening is considered 110.

The rooster recorded in the 80 to 83 decibel range only two frequencies, 1,000 and 2,000 hertz and then two frequencies in the 70 to 75 decibel range.

MS. MADISON: Could you repeat that (Indiscernible)?

Q. BY MR. ANDERSON: Did you (indiscernible) the chart, did you chart that in any way?

A. Yes, I wrote it down.

Q. Hold it up so we can look at it.

A. Well, I don't know, I don't think you're going to be able

to see it from here.

Q. Well, let's see it.

A. I wrote out my results.

MS. MADISON: Could you repeat the 70 to something? I got the 80 to 85.

THE WITNESS: On, 70 to 75 decibels, there were two frequencies in that range.

Q. BY MR. ANDERSON: What was the other range, sir?

A. For the rooster?

Q. Yes.

A. It was like 80 to 83. [Page 8]

Q. That was the highest that you could get?

A. Yeah.

Q. Did you have to be real close to him or --

A. Well, I was approximately 20 to 25 feet away in each instance, for each reporting to make it consistent.

Q. Okay. Now could you please tell us, did you go measure

other animals?

A. Yes. I measured some conyers which are birds.

Q. Could you spell that?

A. C-o-n-y-e-r. ....

Q. What kind of bird is that?

A. It's like a tropical bird, maybe from South America.

Q. Is it like a parrot?

A. It doesn't look like a parrot, it's colored yellow and something else.

Q. Okay. And then what did — what measurements did you --

A. This conyer actually pinned the gauge [Page 9] against the 83 which was the highest level in six frequencies. 2,000, 2,500, 3,140, 4,000, 5,000 and 6,300 hertz. Also we had one frequency in the 70 to 80 decibel range of 8,000 hertz.

Q. That doesn't make much -- tell us what that means. Break it down so we can understand it.

A. First of all, sound can be broken into different frequencies. The more frequencies it has at high decibels the higher the sound gets. So if we have more decibel bands recorded at different frequencies and high frequencies we know we're getting a very loud sound.

Q. Okay. So now the rooster did two ranges and the conyer did six ranges, is that correct?

A. Yes.

Q. And the six ranges were loud?

A. Yes. Pinned the gauge at the top at 83.

Q. When you say pinned the gauge at the top at 83, what do you mean by that?

A. It may have been higher than 83, it could not go any higher on the scale that was set on the instrument.

Q. Okay. And is this machine able to go up to 110 decibels? [Page 10]

A. You have to change the scale.

Q. Did you not change the scale?

A. Well, I didn't change the scale because when you change the sensitivity sometimes you lose other frequencies in your measurements.

Q. So what you're trying to do is find out the number of frequencies that this bird was screeching at?

A. Yes. And the level.

Q. So it was six ranges plus it pegged at?

A. 83.

Q. 83. Okay. To be fair, was it 83 in all of the six ranges?

A. If I could just check my notes here.

It was 83, pinned at 83 on five of them and then 80 at one of them. The 2,500 hertz was at 80 decibels and the 2,000, 3,150, 4,000, 5,000, 6,300 I believe are the numbers I gave him, were pinned at the top.

Q. Okay. Now did you go out and check any other animals or bird or anything else?

A. Yes, I did.

Q. And what did you do, sir?

A. I checked a donkey.

Q. Okay. And what did you find for the [Page 11] donkey.

A. The donkey also provided a high range, approximately six frequencies at the 80 to 83 decibels.

Q. Okay. Did you break that down like you did for the conyer as to what frequencies (indiscernible).

A. Yes, I did.

Q. What?

A. The frequencies of the donkey were 315 hertz, 800, 1,000, 1,250, 1,600 and 2,000. And of those, five of the frequencies were pinned at the very top of the gauge.

Q. Now if you could give me your opinion as an engineer which was louder, the donkey, the conyer or the rooster?

A. Well, the conyer and the donkey were loudest. The conyer's frequencies were higher than the donkey's so it was a

little bit more piercing, but the donkey was equally loud.

* * *

CROSS-EXAMINATION BY MS. MADISON:

[Page 14, Line 9]Q. And when you did the testing on the conyer, where was the conyer at?

A. The conyer was located down the street approximately five houses, in the backyard of the house.

Q. And were you -- how far were you between the conyer and where the machine (indiscernible)?

A. 20, 25 feet in each incidence.

Q. And what time of the day did you do this?

A. Well, I met at Mr. Skeens at 5:30 in the morning, I believe it was around 6:00 when the rooster first crowed, it might have been a little earlier. I believe we were down at the other house 6:30, quarter to 7:00, maybe. It was when the sun was coming up that those birds also were making noise. [Page 15]

Q. Now was this conyer someone's pet?

A. I believe so.

Q. Is the conyer a (indiscernible)?

A. I really don't know. I don't believe it is, but I don't really know. It looks like a tropical bird.

Q. Now, were you doing anything to have this conyer make a sound or was he just doing that?

A. I just stood there and waited.

Q. Could the conyer see you, do you know, or were you bend something and it just was making noise?

A. There was opening land between myself and where the birds were.

Q. This donkey, where was the donkey at in relation or where was the donkey at when you did this?

A. The donkey was up in -- on Monte Cristo Road.

Q. And where is that in relation to the defendant?

A. I think it's northeast.

Q. And was it someone's backyard or in a coral?

A. Yeah. Big penned in areas. Approximately (indiscernible).

Q. And were you 20 to 25 feet from the [Page 16] donkey?

A. Yes, they had the donkey kept in a smaller pen so it couldn't get too far away.

Q. At what time were you doing this with the donkey?

A. Well, I actually went twice. I went over there one time in the afternoon at about 4:30 I got there, I stayed until a little after 5:30, and it was just when I was leaving, after I had broken my equipment down, that the donkey made his noise. And then I had to return in the morning. I was there at 7:00 in the morning. I actually got there a little early about a quarter of and the first sound I heard from the donkey was approximately at 7:00, another time at about 7:15, and I recorded that, and he went one more time after that.

Q. Did he just make this sound one time or what

happened?

A. He'll wait a little while and then he'll get excited again or something. I don't know really what makes him go, but he'll just make a hem and haw as donkeys do.

**IN THE CITY OF GLENDALE CITY COURT**
**COUNTY OF MARICOPA, STATE OF ARIZONA**

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | No. 94-P-1298 |
| Plaintiff, | ) | |
| | ) | MOTION TO DISMISS |
| v. | ) | |
| | ) | |
| NORMAN E. SKEENS, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

COMES NOW the Defendant Norman Skeens, by and through his attorney, Ross Anderson, and moves the court as follows:

1. To dismiss the above complaint as the rooster in question is an exotic household pet permitted at the property located at 8607 West Cavalier Drive, Glendale as an accessory use pursuant to Sec. 5-205(J), Glendale Zoning Ordinance.

2. In the alternative, to declare Glendale Zoning Ordinance Sec. 5.212 unconstitutional as arbitrary and unreasonable.

WHEREFORE, the Defendant, Norman Skeens respectfully requests the court dismiss Complaint No. 94-P-1298.

In support of this motion, Defendant submits the attached Memorandum.

RESPECTFULLY SUBMITTED this 30th day of November, 1994.

*Skeens & Anderson*

*By /s/ Ross Anderson*

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**MEMORANDUM OF POINTS AND AUTHORITIES**

1. Household pets are permitted as accessory uses in the SR-30 zoning district. The ordinance defines a household pet as follows:

> "Small animals which are customarily kept as household pets or which are generally trainable and readily adaptable to urban residences. Household pets may include small domestic animals as well as other non-traditional pets and exotic animals." Glendale Zoning Ordinance,

The rooster in question here certainly qualifies as a "household pet" under this ordinance.

**i. Non-traditional pet.** Farmers keep certain types of animals on their farms for commercial or other reasons unrelated to the traditional notion of a "pet." It is true that roosters are normally farm animals, not pets. However, Mr. Skeens is clearly not running a farm. He maintains a family residence in accordance with the SR-30 zoning of his property. As a result, the rooster on his property cannot be a farm animal because there is no farm. The rooster can only be classified as a household pet. The bird's status as a male chicken should not be the sole basis for its disqualification as a household pet. The rooster is certainly a non-traditional pet, but it is nonetheless a pet just as much as if it had been a dog or cat.

Indeed, the rooster has many characteristics of a pet. The family feeds him, cares for him, and Mr. Skeens' grandson

plays with the rooster just as any child would play with a family dog or cat. The rooster has been named "Einstein" by the Skeens' grandson as a tribute to its intelligence and attachment to the family. The rooster recognizes Mr. Skeens and will approach him in the yard.

If the City's position on the rooster is adopted, it would mean that any animal or bird commonly found on the farm but which would be a "non-traditional" residential family pet, could not be kept as a household pet. This position is clearly in derogation of the ordinance which expressly permits non-traditional pets. Indeed, as the Hawaii Appellate court stated on similar facts "the only animals permitted as pets in residential areas would be those that are customarily found in a residential neighborhood, such as dogs and cats, or birds." *Foster Village Community Association v. Hess,* 667 P.2d 850, 855 (Hawaii App., 1983). The City's position is clearly an unreasonable reading of the "household pet" accessory use

permitted by Sec. 5.200 *et seq.* because it assumes *a prior* that a rooster cannot be a household pet.

**ii. Exotic Pet.** The rooster is a Polish Crested poultry, a bird not native to the State of Arizona. The breed was imported from Poland in 1874, and it has long been an ornamental fowl, used in exhibition. Webster's Encyclopedic Dictionary defines "exotic" to mean "1. *adj.* brought in from a foreign country, . . . or very unusual, attractively strange." This rooster has a black body and a large white crest of feathers rising from its head, and certainly fits the definition of "exotic." Exotic pets are included in the definition of "household pets" and thus this rooster qualifies as an exotic household pet. As a result, this rooster should be permitted on property zoned SR-30 pursuant to Sec. 5.205, Glendale Zoning Ordinance.

2. Section 5.212, Glendale Zoning Ordinance reads in pertinent part as follows:

> . . . The raising of poultry with the exception of male fowl, is permitted provided they are

contained within a fence or cage.

The ordinance permits the raising of poultry, but forbids the raising of male fowl.

The exclusion of male fowl in Section 5.212 is clearly arbitrary and unreasonable, with substantial relation to the public health, safety, morals, or general welfare. *See, e.g. City of Phoenix v. Oglesby,* 112 Ariz. 64, 537 P.2d 934 (1975). Male fowl do not pose any greater risk to health or safety than a full flock of hens would pose. Indeed, a single rooster would seem to be much less of a health or safety threat than an entire flock of messy hens or a pack of loud dogs, yet the hens or dogs are allowed under this ordinance and roosters are not.

This position is highly unreasonable given the City's recent adoption of a new zoning ordinance, the A-1 district, which permits male fowl. Since the SR-30 district is meant as a transitional district between urban and rural areas, then there is no discernible reason why roosters should be restricted in an

SR-30 district. The SR-30 district seems to be exactly the type of district in which small, "traditionally" farm animal-type pets would be permitted, since the residents of an SR-30 district are not permitted the same large farm animals the A-1 district permits. Indeed, the City has admitted that the property in question is a "transitional" zone between urban and rural areas. As such, restrictions on the keeping of roosters are clearly arbitrary and capricious, and based on nothing but a preconceived bias against male fowl.

The City administration cites noise as a reason for excluding male fowl from the SR-30 district. However, this reasoning is clearly arbitrary as to roosters. An SR-30 district may contain hundreds of animals or birds which, while permitted by the ordinance, could be much more raucous and disruptive than a rooster. Burros, geese, parrots, and even dogs could be louder and more annoying than a rooster in the same location. A dog or group of dogs could and probably would

bark at any time, day or night. A burro or parrot's vocal statement might be heard for acres over a semi-rural area. Yet those animals are not excluded under this ordinance--only male fowl and their owners are affected. If male fowl make too much noise for "health, safety, morals or general welfare" then it seems clear that any of the above animals, or countless others, would also have to be restricted. Since it is only male fowl which actually are restricted, the arbitrary nature of the ordinance against roosters seems clear.

As a result of the ordinance, all male fowl must be removed from a resident's property, regardless of their potential status as pets. Again, if the City's position is upheld, "the only animals permitted as pets in residential areas would be those that are customarily found in a residential neighborhood, such as dogs and cats, or birds [except roosters]." *Foster Village Community Association v. Hess*, 667 P.2d 850, 855 (Hawaii App., 1983) (material in brackets

added). In addition, the only animals which *should* be permitted in the SR-30 district under the City's current reasoning are "traditional" animals that do not make any noise, such as cats or goldfish. The City's position toward male fowl is clearly unreasonable because it restricts all ownership or keeping of male fowl, and drawn to its limit, appears to restrict property owners to only certain types of pets which fit "traditional" notions of (quiet) neighborhood pets. Such reasoning has no substantial relation to health, safety, morals, or general welfare--it only shows a predisposed bias toward male fowl.

Finally, the inconsistency and unreasonableness of Sec. 5.212 is clear on its face. The ordinance permits the raising of poultry, but forbids the keeping of male fowl. However, it is impossible to "raise" poultry without also keeping at least one male fowl. The arbitrary nature of the City's position in this ordinance seems clear when it is understood that without male

fowl, "raising" chickens is not possible.

WHEREFORE, defendant Norman E. Skeens respectfully requests that the attached Motion to Dismiss be granted and that the Polish Crested rooster known as "Einstein" be permitted to remain on his property at 8607 West Cavalier Drive, Glendale.

RESPECTFULLY SUBMITTED this 30th day of November, 1994.

*Skeens & Anderson*

*By /s/ Ross Anderson*